A **MAYBAN FINANCE BHD**

v.

LEE KEE SEN

B HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG J
[BANKRUPTCY NO: KCH-29-86-1998-II]
25 JULY 2013

C ***BANKRUPTCY:*** *Discharge - Discharge without settlement - Application by Director General of Insolvency ('DGI') - Factors considered by court - Whether discharge justified - Whether DGI restrained from issuing certificate of discharge for a period of two years - Bankruptcy Act 1967, ss. 33A & 33B(6)(b)*

D The Director General of Insolvency ('DGI') had appealed against the learned Senior Assistant Registrar's ('SAR') decision in respect of the judgment creditor's ('JC') application to prohibit the DGI from issuing a certificate of discharge under s. 33A of the Bankruptcy Act 1967 ('the Act') towards the judgment debtor ('JD'). The current judgment debt was at RM43,447.53 which remained unsatisfied. The JC contended that E it was unfair for the JD to be discharged simply because he had been consistent in paying his monthly instalments to the DGI for the last fourteen years and had no more assets or properties left for the DGI to administer. The JD exhibited no interest to be discharged and did not file any affidavit nor attend the hearing of the application before the SAR even though the application was served on him. It was submitted F on behalf of the JD that the JD should not be chained for life to pay his debt when he had no more assets for the DGI to administer. It was further submitted that the JD was made a bankrupt because as a director, he stood guarantor for his company and the economic recession in 1997 caused the company not to settle its debt. As the JD was 48 G years of age and worked with a company as a senior technical supervisor earning only RM2,600 per month, he could not be expected to continue paying the monthly contribution.

Held (restraining DGI from issuing certificate of discharge for a H period of two years):

(1) The JD was still relatively young and with a steady employment, he should continue to honour the obligation to pay his debts even though the bankruptcy may not be totally his fault but contributed to by the state of the economy. Factors to be considered by the I court in considering an application for a discharge were the report of the official assignee, the cause of the bankrupt's insolvency, his conduct relevant to it and subsequent to his insolvency as well as the interests of the public at large and commercial morality. (para 7)

(2) Since application for discharge was made by the DGI and not the bankrupt, the former bore the burden to justify that the discharge was warranted. A delicate balance between the interests of the bankrupt to free himself from the chains of bankruptcy and the right of the JC, including his other creditors, to receive the judgment sum must be achieved. (para 7)

(3) Considering the JD's conspicuous absence in this proceeding, the lack of evidence surrounding the events that led to the bankruptcy against the fact that the JD had been in bankruptcy for 14 years with no more assets to realise, it would be fair to both parties that the alternative prayer in the JC's application made under s. 33B(6)(b) of the Act be allowed. Thus, the DGI was restrained from issuing the certificate of discharge for a period of two years commencing from the date of the judgment. (para 8)

Case(s) referred to:
Lim Hun Swee v. Malaysia British Assurance Bhd & Ors And Other Appeals [2010] 8 CLJ 680 CA ***(dist)***
Public Bank Bhd v. Kok Lee Wah [2005] 5 CLJ 212 HC ***(dist)***
Re Mohana Sundari M Subramaniam; Ex P United Prime Corporation Bhd [2004] 1 CLJ 624 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 16, 33(4), 33A, 33B(6)(b)

For the judgment creditor - Antonio Sim Peak Khiong; M/s Kadir, Wong, Lin & Co Advocs
For the Director General of Insolvency - Suriyati Ismail; FC

Reported by Sandra Gabriel

JUDGMENT

Rhodzariah Bujang J:

[1] By a notice of application dated 27 December 2012, the judgment creditor applied for an order to, *inter alia*, prohibit the Director General of Insolvency ("DGI") from issuing a certificate of discharge under s. 33A of the Bankruptcy Act 1967. The DGI has appealed against the decision made by the learned Senior Assistant Registrar in respect of the said application. However, despite the clear fact of the appeal, what was the decision under appeal has left both the DGI and I in a fix because in the notes of proceeding for the day of delivery of the ruling it was merely stated that ruling was read out (by another Senior Assistant Registrar) and in the schedule of the case on the said date, ie, 10 May 2013 as entered and captured in the courts computerisation system, the

result was stated as "application hereby dismissed with no cost". But, in the grounds of the ruling supplied by the learned Senior Assistant Registrar subsequent to the said date, the learned Senior Assistant Registrar appeared to agree with the judgment creditor that the discharge certificate should not be issued although he concluded it by saying that "this application by the Insolvency Office for discharge of the bankrupt hereby dismissed with no order as to costs"(*sic*). The DGI in its officer's written submission has labelled the decision confusing and I really am hard-pressed not to disagree. Nonetheless, since an appeal to a judge in chamber proceeds by way of a re-hearing the anomaly in the Senior Assistant Registrar's decision is circumvented by me hearing the application afresh without having to refer to his grounds of decision.

Merits Of The Application

[2] The judgment creditor contended that it was unfair for the judgment debtor to be discharged simply because he had been consistent in paying his monthly instalments to the DGI for the last 14 years and had no more assets or properties left for the DGI to administer. The judgment debt standing now at RM43,447.53 according to the DGI (though the amount lodged by the judgment creditor's former solicitor was RM47,856.43) remained unsatisfied despite the successful conclusion of foreclosure proceedings on the judgment debtor's landed properties. Further, the judgment debtor did not make any proposal to settle his outstanding debt and the DGI did not call any creditor's meeting on the administration of his debt. Discharging him now when there are outstanding debts owed by him to not just the judgment creditor but others as well would send a wrong message to the public that it is alright to be a bankrupt for a discharge can be obtained without a need to honour all the debts proved against him.

[3] Further, deposed the judgment creditor in the affidavit supporting the application, against s. 16 of the Act, the judgment debtor only submitted his statement of affairs seven years after the receiving order and adjudication order were made against him when that section said it must be done within 21 days of the said orders. The Court of Appeal case of *Lim Hun Swee v. Malaysia British Assurance Bhd (currently known as Allianz General Insurance Malaysia Bhd) & Ors And Other Appeals* [2010] 8 CLJ 680; [2011] 2 MLJ 216 was cited as authority for the proposition that having committed such an offence, the court held that it should refuse to order the discharge until a dividend of not less than 50% has been paid to the creditors, as clearly stipulated by the first limb of s. 33(4) of the Act. This authority, I must quickly add is not a case in point as it concerns a different section on discharge of a bankrupt ie, by his own application.

[4] In the submission of the State Director of Insolvency, Puan Zalina binti Yacob ("Puan Zalina") she referred to the case of *Re Mohana Sundari M Subramaniam; Ex P United Prime Corporation Bhd* [2004] 1 CLJ 624; [2004] 5 MLJ 227 in which Zulkefli Makinudin J (as His Lordship then was) held that in considering an application for discharge the amount of debt still owing to the creditor is not a factor which the court should place too much reliance on. His Lordship continued that those who became bankrupt from being caught at the wrong turn of the economic cycle should be given a second chance.

[5] She further submitted that the judgment debtor should not be chained for life to pay his debt when he had no more assets for the DGI to administer and that the enacting of express provisions such as s. 33A into the Act allows for the discharge of a bankrupt before he settles all his debts.

[6] In weighing the scales of justice based on the grounds and contentions put forth by the parties as stated above, I am mindful of one salutary fact – the judgment debtor himself did not deem it fit to champion his own cause as he did not file any affidavit nor attend the hearing of the application before the learned Senior Assistant Registrar even though the application was served on him. It seems to me that by his conduct he exhibited no interest to be so discharged. But continuing the defence on his behalf, Puan Zalina submitted that he was made a bankrupt because as a director, he stood guarantor for his company and the economic recession in 1997 caused the company not to settle its debt. He is currently 48 years of age, with two school young children, a wife who is not working (and also a bankrupt) and working with a company as senior technical supervisor, earning only RM2,600 per month. Therefore, she said he cannot be expected to continue paying the monthly contribution of RM300.

[7] Precisely for the reason that he is still relatively young and with a steady employment that I think that he should continue to honour the obligation to pay his debts even though the bankruptcy may not be totally his fault but contributed to by the state of the economy. Again, like the judgment creditor's counsel, the cases cited by Puan Zalina ie, *Re Mohana*'s case (*supra*) and *Public Bank Bhd v. Kok Lee Wah* [2005] 5 CLJ 212; [2004] 4 MLJ 433 concern applications for discharge filed by the bankrupts themselves and there were evidence before the court that the bankruptcy were brought about by factors beyond their control. As Zulkefli J said in *Mohana's* case (*supra*) in considering the application for such a discharge, factors to be considered by the court are the report of the Official Assignee, the cause of the bankrupt's insolvency, his conduct relevant to it and subsequent to his insolvency as well as the interests of the public at large and commercial morality. However,

this application being made by the DGI, not the bankrupt, the former bears the burden of justifying that the discharge is warranted and just in the circumstances of the case. What is just must be to achieve a delicate balance between the interests of the bankrupt to free himself from the chains of bankruptcy and the right of the judgment creditor, including his other creditors to receive the judgment sum.

[8] Considering the fact as I mentioned earlier, which is the judgment debtor's conspicuous absence in this proceeding, the lack of evidence surrounding the events that led to his bankruptcy but viewing these against the fact that he has been in bankruptcy for 14 years with no more assets to realise, it would be fair to both parties that the alternative prayer in the judgment creditor's application made under s. 33B(6)(b) of Act be allowed ie, that the DGI be restrained from issuing the certificate of discharge for a period of two years commencing from the date of the judgment. As for cost of the application, the judgment creditor's counsel Mr Louis Achuk has graciously agreed to forgo cost at the date of delivery of this ruling.